
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARMAND F. ROBERGE,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION
OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The Tax Court's memorandum findings of fact and opinion

(I-R. 198-206) are not officially reported.

JURISDICTION

This petition for review (I-R. 225-230) involves federal income taxes for the taxable year 1961. On January 17, 1963, the Commissioner of Internal Revenue mailed to the taxpayer a notice of a deficiency, asserting deficiencies in taxes for the years 1960 and 1961 in the

aggregate amount of \$1,569.20 (I-R. 5-9). ^{1/} Within ninety days thereafter, on April 15, 1963, the taxpayer filed a petition with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-15.) The decision of the Tax Court was entered March 9, 1966. (I-R. 224.) The case is brought to this Court by a petition for review filed June 2, 1966 (I-R. 225-230), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Was the Tax Court correct in holding that the gain realized by taxpayer on the sale of his property at 455 North 35th Street, Seattle, Washington, which he held for rental and investment purposes, is to be recognized as a long-term capital gain?

STATUTES INVOLVED

The pertinent portions of the statutes involved are set out in the Appendix, infra.

STATEMENT

Armand F. Roberge, the taxpayer, resided at Cle Elum, Fall City, and 12508 Eighth Place, Everett, Washington, during the year in question, 1961. Taxpayer purchased part of the land at 12508 Eighth Place in 1957 and the remainder of it in 1961. He lived in a partially completed building on that land during 1961. (I-R. 199, 201; II-R. 18; Ex. 10, I-R. 81; Pet. Br. 6.)

^{1/} The Commissioner conceded at trial that there is no deficiency in tax for 1960. (I-R. 198-199.)

Prior to 1961, taxpayer owned two pieces of property which he held for rental and investment purposes, one of these properties was located at 2120 East 54th Street, Seattle, Washington. It was acquired on March 3, 1955, and sold in 1961. Since the taxpayer did not recover his adjusted cost basis in 1961, the parties agree that no capital gain was realized in that year on that sale. The other rental and investment property was located at 455 North 35th Street, Seattle, Washington. Taxpayer acquired it on April 4, 1957, for a purchase price of \$4,250. During the years 1947 through 1959 taxpayer made additions and improvements to this property in the total amount of \$14,196.47. In 1961 taxpayer sold this property for \$12,000 in cash to the Seattle Disposal Company, a private corporation (I-R. 200-201; Stip. par 19, I-R. 51.) Taxpayer used the cash to purchase land at 12508 Eighth Place and in construction of a residence thereon.

The Commissioner determined that taxpayer realized a long-term capital gain in the amount of \$1,678 on the sale of the property at 455 North 35th Street, computed by considering the original cost, cost of improvements and additions, depreciation allowed and allowable, and the sale price, all of which were stipulated. (I-R. 201-202.) ^{2/}

In the Tax Court, the taxpayer argued that he realized no gain on the sale of the property at 455 North 35th Street, and, in the

^{2/} Taxpayer's basis was reduced to \$10,322 by taking into account depreciation which was claimed and allowed on the basis of a 15 year useful life of the property.

alternative, that such gain was not recognizable for tax purposes under Sections 1031, 1033, and 1034 of the Internal Revenue Code of 1954. The Tax Court rejected his contentions, holding that taxpayer "has submitted no probative evidence and has directed our attention to no authorities in support of his position." (I-R. 202.)

SUMMARY OF ARGUMENT

Taxpayer sold property held for rental and investment purposes and used the proceeds to purchase property which he used as his residence and hoped later to rent. The gain on that sale is recognized unless taxpayer can show that the transaction comes within one of the nonrecognition provisions of the Internal Revenue Code of 1954. He urges that the transaction comes within Section 1031, 1033 and/or 1034.

Section 1031 provides for nonrecognition of gain from the exchange of income-producing property for property of a like kind. That section has no application to a sale for cash (as in the instant case) since a sale does not qualify as an exchange. This is clear from the decided cases and the legislative history of Section 1031. It also does not apply since like-kind property was not acquired.

Section 1033 provides for nonrecognition of gain from an involuntary conversion. Such involuntary conversion may occur through destruction, theft, seizure, or condemnation or requisition of the threat thereof. The property in question concededly was not destroyed, stolen or seized. Taxpayer admitted in his testimony that the property in question was voluntarily sold and not condemned,

requisitioned or under threat of such proceedings. Therefore Section 1033 has no application to the instant case.

Section 1034 provides for nonrecognition on the gain realized from the sale of one's principal residence under certain conditions. The statute clearly does not apply to the instant case where taxpayer sold property which the facts of record show was not his principal residence. Further, taxpayer's attempt to combine Sections 1031 and 1034 is totally unjustified and contrary to the clearly expressed intent of Congress.

Accordingly, the taxpayer cannot show that the nonrecognition sections of the Internal Revenue Code apply to the transaction here in question. The Tax Court was, therefore, correct in holding that the taxpayer's realized gain is recognized.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT THE GAIN REALIZED BY TAXPAYER ON THE SALE OF HIS PROPERTY AT 455 NORTH 35th STREET, SEATTLE, WASHINGTON, WHICH HE HELD FOR RENTAL AND INVESTMENT PURPOSES IS TO BE RECOGNIZED AS A LONG-TERM CAPITAL GAIN

A. Introduction

In 1961 taxpayer sold certain property (land and a building thereon at 455 North 35th Street in Seattle) which he held for investment and rental purposes, for \$12,000 in cash. (I-R. 200.) With part of the cash received on that sale, he purchased in a separate transaction in that same year, another piece of land (located

at 12508 Eighth Place, Everett, Washington) and began construction thereon of a house to be used as his personal residence and for rental purposes. (I-R. 201, 203.) The house at 12508 Eighth Place had not been completed at the time of trial, nor had any portion of it been rented although taxpayer has resided there since 1961. (I-R. 201, 204; II-R. 18; Ex. 10, I-R. 81.) This appeal presents the question of whether the gain realized on the sale of the property at 455 North 35th Street is to be recognized for tax purposes. ^{3/}

A gain realized from the sale or exchange of property is recognized and results in taxable gain unless the taxpayer can show that one of the nonrecognition provisions of Subtitle A of the Internal Revenue Code of 1954 governs such sale or exchange. Internal Revenue Code of 1954, Section 1002, Appendix, infra. Taxpayer argues that this transaction is governed by Sections 1031, 1033 and/or 1034 of the 1954 Code Appendix, infra. None of these provisions apply to the sale in question, however, the gain realized on that

^{3/} In the Tax Court, taxpayer argued that he realized no gain on the sale in question. (I-R. 202.) On appeal, he has apparently dropped this contention and argues only that the gain, although realized, is not recognized. (Br. 9-10.) The amount of gain which taxpayer realized is the excess of the amount received over the adjusted basis of the property sold. Internal Revenue Code of 1954, Section 1001(a), Appendix, infra. Taxpayer stipulated the amount he received on the sale as well as all elements necessary to determine his basis. The Tax Court's decision was based on these stipulated facts, which showed that taxpayer had realized a gain on the sale in question. (I-R. 202.)

sale results in taxable income to taxpayer, as found by the Tax Court.

- B. Congress has limited the application of Section 1031(a) to exchanges of like-kind property; that section does not apply where property is sold and the proceeds are invested in dissimilar property

Under Section 1031(a) of the 1954 Code, no gain or loss is recognized if property held for productive use or investment is exchanged for property of a like kind (except to the extent of "boot" received in addition to the like-kind property under Section 1031(b)). If, on the other hand, property held for productive use or investment is sold, the gain or loss realized on the sale is recognized.

Section 1002 of the 1954 Code. ^{4/} The distinction between a sale and exchange is crucial to the disposition of this case. No "exchange" as contemplated by Section 1031 occurred here when the taxpayer sold his property at 455 North 35th Street to the Seattle Disposal Company and thereafter invested the proceeds in other property. Those transactions did not amount to an exchange since "Exchange" is a word of precise import, meaning the

^{4/} The reason for this difference in treatment is that, in an exchange, while taxpayer has realized gain or loss in a constitutional sense, his money is still tied up in a continuing investment and he has not realized gain in a practical and economic sense. In a sale, on the other hand, taxpayer has "cashed in" on his gain or closed out his losing venture, and gain or loss is realized in both the constitutional and the practical and economic sense. Portland Oil Co. v. Commissioner, 109 F. 2d 479 (C. A. 1st), certiorari denied, 310 U. S. 650.

giving of one thing for another, requiring the transfer to be in kind, and excluding transactions into which money enters either as the consideration or as a basis of measure." Trenton Cotton Oil Co. v. Commissioner, 147 F. 2d 33, 36 (C. A. 6th); see Bloomington Coca-Cola B. Co. v. Commissioner, 189 F. 2d 14, 16 (C. A. 7th); Cowden v. Commissioner, decided October 21, 1965 (P-H Memo T. C., par. 65,278), affirmed per curiam, 365 F. 2d 832 (C. A. 1st), petition for writ of certiorari pending (1966 Term, No. 872).

Both Section 1031(a) and its legislative history place an important qualification on the rule of nonrecognition contained therein. While the legislative mandate is to postpone recognition of gain or loss when the essential features of the investment remain the same, Section 1031(a) extends that rule only to true exchanges of like property. A sale, even though followed by an immediate reinvestment in similar property, does not fall under that statutory umbrella. Coastal Terminals, Inc. v. United States, 320 F. 2d 333, 337 (C. A. 4th); Trenton Cotton Oil Co. v. Commissioner, supra, p. 36; Bloomington Coca-Cola B. Co. v. Commissioner, supra, p. 16; Rogers v. Commissioner, 44 T.C. 126, pending on appeal (C. A. 9th, No. 20,621); Detroit Egg Biscuit & Specialty Co. v. Commissioner, 9 B.T.A. 1365. That a sale of property for cash and a subsequent investment of the proceeds in other property is not an exchange within the meaning of Section 1031 is clear from the following colloquy in the House of

Representatives between one of the sponsors of the bill containing the original predecessor of Section 1031 (Section 203(b)(1) of the Revenue Act of 1924, c. 234, 43 Stat. 253) and another Representative (65 Cong. Record, Part 3, p. 2799):

Mr. LaGuardia. Under this paragraph is it necessary to exchange the property? Suppose the property is sold and other property immediately acquired for the same business. Would that be a gain or loss, assuming there is a greater value in the property acquired?

* * * *

Mr. Green of Iowa. If the property is reduced to cash and there is a gain, of course it will be taxed.

Mr. LaGuardia. Suppose that cash is immediately put back into the property, into the business?

Mr. Green of Iowa. That would not make any difference.

Accordingly, it is clear from the decided cases and the legislative history that the transactions in the instant case do not qualify as an exchange and are, therefore, not governed by Section 1031. This result is within the intent of Congress in enacting Section 1031 since, when taxpayer sold the property at 455 North 35th Street, he received \$12,000 in cash which he was free to use as he wished. He had realized a gain in every sense of the word and, therefore, that gain is recognizable for tax purposes. The fact that he chose to

invest the proceeds of the sale in different property does not change the essential nature of the previous sale. ^{5/}

C. Section 1033 does not apply to taxpayer's voluntary sale of his property to a private corporation

Section 1033(a) of 1954 Code provides that gain realized upon an involuntary conversion of property will not be recognized. An involuntary conversion is one occasioned by destruction, theft, seizure, or condemnation or requisition or the threat thereof. Taxpayer argues that the property in question was condemned.

In order to qualify for nonrecognition under the portion of Section 1033(a) relating to condemnation and requisition, taxpayer must show that a government--state, local or federal--instituted condemnation or requisition proceedings or threatened to do so. Hitke v. Commissioner, 296 F. 2d 639 (C. A. 7th). Such condemnation must be completely beyond the control of the taxpayer. Dear Publication & Radio, Inc. v. Commissioner, 274 F. 2d 656 (C. A. 3d). In the instant case taxpayer testified at trial that he was approached by a Mr. Meacham, of the Seattle Disposal Company, who offered him \$12,000 for the property in question, which he accepted. (II-R. 25.) He conceded that the Seattle Disposal Company was a private corporation engaged in the business of garbage collection

^{5/} Section 1031(a) is not applicable also because the property sold was unlike the property later acquired. The Tax Court did not reach that question, however, because of the absence of the requisite exchange. (I-R. 204.)

which had no connection with the government other than its possession of a contract with the City of Seattle for collection of garbage.

(II-R. 40.) Taxpayer testified as follows (II-R. 40):

Q. Did the state, federal or any municipal government condemn or requisition your property? Did they [Seattle Disposal Company] get any information from any of these governments that your property was to be condemned?

A. No, it was just obvious.

Q. Did you, in fact, receive any communication from any government, whether it be on the city, state or federal level, with respect to condemnation of this property at 455 North Thirty-fifth Street?

A. No.

Since, by taxpayer's own admission, there was no requisition, condemnation, or threat thereof, Section 1033 has no application to gain realized on the sale in question.

D. Section 1034(a), providing for non-recognition of gain realized from the sale of a residence under certain conditions, does not apply to the sale of rental and investment property

Section 1034(a) of the 1954 Code provides that where a taxpayer sells his principal residence and, within a period beginning one year before the date of sale and ending one year after the date of sale, purchases a new residence, gain will be recognized only to the extent that the adjusted sales price of the old residence exceeds the cost of purchasing the new residence. As already stated, taxpayer in the instant case sold property which he held for rental and

investment purposes and invested the proceeds in a residence. Section 1034(a) on its face applies only to the sale of one's old residence and purchase of a new residence. The statute clearly does not apply to the instant case.

In the Tax Court, taxpayer argued that he sold two pieces of property as a "package", 455 North 35th Street, the rental and investment property, and 2120 East 54th Street, the residential property, and that the property purchased was held for rental and investment as well as residential purposes. (I-R. 203.) The record in this case, however, fails to disclose any link between the two transactions. Taxpayer claimed that Section 1031 (relating to exchanges of income-producing and investment property) and Section 1034 (relating to sale of a residence) could be combined to avoid any recognition of gain on these transactions. The Tax Court rejected this argument, as follows (I-R. 205-206):

We find no justification for petitioner's [taxpayer's] apparent attempt to combine the use of sections 1031 and 1034 to obtain non-recognition of his gain on the sale of the property at 455 North 35th Street, Seattle, Wash. Each of those sections was enacted to provide relief in the specific circumstances covered therein and there is no authority for combining two separate transactions to gain partial nonrecognition of gain under one section and nonrecognition of the remaining gain under the other section.

It is not clear whether on this appeal taxpayer renews the contention made in the Tax Court. He now argues that 455 North

35th Street was his principal place of residence when it was sold in 1961 and that Section 1034(a) applies for that reason. (Br. 9, 14.) Before trial, however, he stipulated that the property at 455 North 35th Street was held for rental and investment purposes and that during 1960 and 1961 he lived at places other than that address. (Stip. pars. 1, 5, 19, I-R. 47, 48, 51.) Since taxpayer introduced no evidence in this connection other than the stipulation, the Tax Court correctly held (I-R. 205): "It is clear that petitioner [taxpayer] was not using the property at 455 North 35th Street, Seattle, Wash., as his residence at the time of the sale * * *."

In any event, it is clear that both of taxpayer's contentions are incorrect. His "package" theory is unsupported by any cases or legislative history and is contrary to the clearly expressed intent of Congress to grant specific relief in specific situations. Further, the transaction in which the property at 2120 East 54th was sold is not before the Court since no gain was recognized on that sale. Taxpayer's argument that the sale of 455 North 35th Street was the sale of his residence is factually incorrect and is inconsistent with his argument below that his residence was 2120 54th Street.

Finally taxpayer argues that the District Court case of Sayre v. United States, 163 F. Supp. 495 (S.D. W. Va.), is controlling here. In that case, the taxpayer exchanged a farm, on which was located their residence, for another farm and in addition received cash boot.

They then invested part of the cash boot in a new residence. The sole issue presented to the court was the allocation of the cash received as between the residence and the farm since only the former portion would not be recognized when it was used to purchase a new residence. There was no question as to whether the transaction qualified for nonrecognition, since, except for the boot, taxpayers were in the same position before the sale as after it. As the court stated (pp. 497-498)--

In the instant case, after the exchange of farms and residences, taxpayers owned geographically different property from that held previously, but they still owned substantially the same things as before. At the beginning of 1951 these plaintiffs owned a farm and a \$9,000 residence. At the conclusion of the transactions described above, they still owned a farm, and a residence * * *.

That case is thus clearly distinguishable from the instant case, where before the sale in question taxpayer owned rental and investment property and after the sale he owned residential property. Further, in the Sayre case the income-producing property was disposed of in an exchange which qualified under Section 1031, (income producing property for income producing property) whereas in the instant case such an exchange was absent.

CONCLUSION

None of the nonrecognition sections of the 1954 Code apply to the instant case. The decision of the Tax Court holding that

taxpayer's gain on the sale in question is recognizable is correct and should be affirmed. 6/

Respectfully submitted,

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MARCH, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1967.

ROBERT H. SOLOMON
Attorney

6/ Taxpayer requests this Court to remand this case to the Small Tax Division of the Tax Court if it is reversed. (Br. 16.) S. 18, 90th Cong., 1st Sess., a bill to establish such a division, is now pending in the Senate and has not been enacted into law. There is, therefore, no authority for the remand which taxpayer requests.

APPENDIX

Internal Revenue Code of 1954:

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION
OF GAIN OR LOSS.

(a) Computation of Gain or Loss.--The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * *

(c) Recognition of Gain or Loss.--In the case of a sale or exchange of property, the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

* * *

(26 U.S.C. 1964 ed., Sec. 1001.)

SEC. 1002. RECOGNITION OF GAIN OR LOSS.

Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.

(26 U.S.C. 1964 ed., Sec. 1002.)

SEC. 1031. EXCHANGE OF PROPERTY HELD FOR PRODUCTIVE
USE OR INVESTMENT.

(a) Nonrecognition of Gain or Loss From Exchanges Solely in Kind.--No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of

indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(b) [as amended by Sec. 201(c), Act of September 22, 1959, P. L. 86-346, 73 Stat. 621] Gain From Exchanges Not Solely in Kind.--If an exchange would be within the provisions of subsection (a), of section 1035(a), of section 1036(a), or of section 1037(a), if it were not for the fact that the property received in exchange consists not only of property permitted by such provision to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * *

(26 U.S.C. 1964 ed., Sec. 1031.)

SEC. 1033. INVOLUNTARY CONVERSIONS.

(a) General Rule.--If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted--

(1) Conversion into similar property.--Into property similar or related in service or use to the property so converted, no gain shall be recognized.

* * *

(3) Conversion into money where disposition occurred after 1950.--Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property (as defined in paragraph (2)) occurred after December 31, 1950, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

(A) Nonrecognition of gain.--If the taxpayer during the period specified in subparagraph (b), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation

owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. Such election shall be made at such time and in such manner as the Secretary or his delegate may by regulations prescribe. * * *

* * *

(26 U.S.C. 1964 ed., Sec. 1033.)

SEC. 1034. SALE OR EXCHANGE OF RESIDENCE.

(a) Nonrecognition of Gain.--If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1953, and, within a period beginning 1 year before the date of such sale and ending 1 year after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.

* * *

(26 U.S.C. 1964 ed., Sec. 1034.)